LINCOLN AND THE CONSTITUTION

# The Dictatorship Question Reconsidered

by

HERMAN BELZ

Professor of History
University of Maryland

The Seventh Annual R. Gerald McMurtry Lecture

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*Lincoln and the Constitution*

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A CONVENTION has gained acceptance in American historiography which, in this Orwellian year that has come to symbolize totalitarian rule, it is fitting for us to consider. I refer to the convention that regards Abraham Lincoln not simply as a forceful war leader who demonstrated the vast power inherent in the presidency, but as a dictator, albeit in many accounts a benevolent and constitutional dictator. Lincoln, it is said, took the law into his own hands in meeting the attack on Fort Sumter, and subsequently in dealing with the problems of internal security, emancipation, and reconstruction. The author of a well known treatise on emergency government in the western political tradition states that "it was in the person of Abraham Lincoln that the constitutional dictatorship was almost completely reposed. . . ."[1] To be sure, some writers use the dictatorship convention in an expressive rather than analytical way to describe the growth of executive power during the Civil War. Moreover, although the characterization derives from contemporary attacks on Lincoln by the Confederate foe and the Democratic political opposition, it has not on the whole been applied with hostility. Yet it is fair to ask whether any description of Lincoln as a dictator—whether constitutional or otherwise—is accurate. As one who has himself employed the convention, I claim the privilege of reconsidering it. I do so not only with a view toward providing a more historically sound description of Lincoln's exercise of presidential power, but also in order to arrive at a clearer understanding of the conception of constitutionalism that sustained his wartime leadership.

The dictatorship charge was directed at Lincoln at the start of the Civil War by both Confederates and northern Democrats who objected to the swift and decisive manner in which he placed the country on a war footing to resist secession. Some of Lincoln's actions, such as his calling up of the militia, were clearly covered by existing law. Other actions, such as his suspending the writ of habeas corpus, ordering an increase in the size of the regular army and navy, and directing that money be paid out of the treasury for war materials, were taken without authority of any existing national statute. Were these actions illegal, unconstitutional, and lawless? This became a bitterly disputed question in the early months of the war, and it aroused even more passionate controversy when Lincoln subsequently, under what he claimed was the war power of the government, imposed martial law in parts of the North, declared military emancipation in rebellious areas, and reorganized loyal state governments in the occupied South. Northern Democrats condemned these measures as the acts of a ruthless military dictator which undermined the Constitution and the rule of law. Southerners joined in the condemnation, and after the war clung to the view of Lincoln as a despot.[2]

Although in a much modified form, the dictatorship theme appears first to have found serious scholarly expression in the writing of William Archibald Dunning. In his pioneering *Essays on the Civil War and Reconstruction* (1897), Dunning described the emergence in 1861 of a revolutionary brand of constitutionalism that substituted popular demand for express legal mandate as the basis of executive action. Reviewing Lincoln's actions after the attack on Sumter, he wrote: "In the interval between April 12 and July 4, 1861, a new principle thus appeared in the constitutional system of the United States, namely, that of a tempo-

rary dictatorship. All the powers of government were virtually concentrated in a single department, and that the department whose energies were directed by the will of a single man." Dunning interpreted Lincoln's presidential dictatorship, approved by lawmakers and the electorate, as evidence that the idea of a government limited by "the written instructions of a past generation had already begun to grow dim in the smoke of battle." For Dunning and his followers the gravest departures from the old constitutional law and morality were perpetrated by Congress during Reconstruction, but the decline began with Lincoln's abrogation of constitutional limits in the name of military necessity and popular demand.[3]

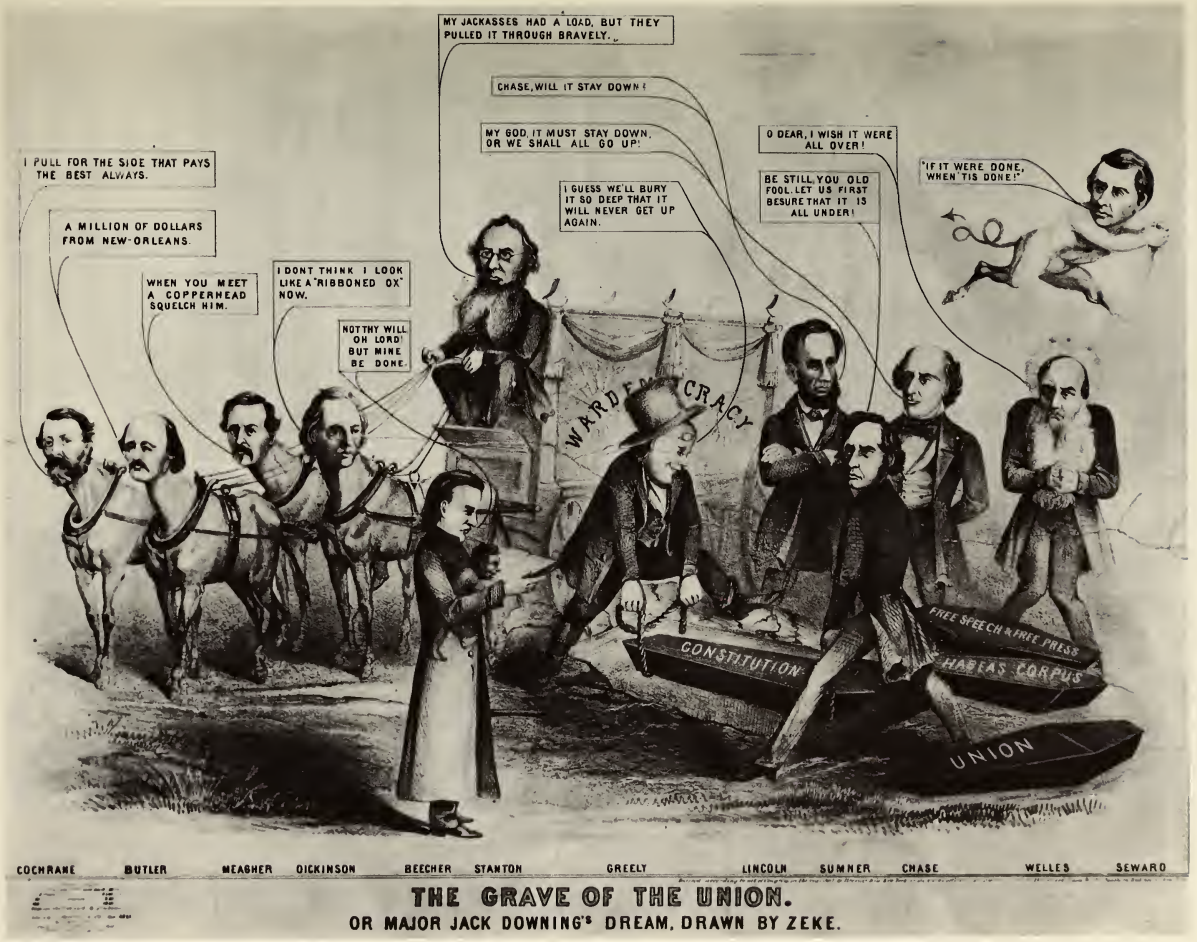
Dunning's astringent analysis established the dictatorship question as a theme in historical writing on the Civil War. Historians' interest in the question in part represented an attempt to penetrate myths surrounding Lincoln's political career which had prevented it from being studied in a spirit of critical realism. The appeal of the dictatorship thesis also reflected the interest in strong executive leadership evinced by scholars and reformers in the progressive era. Whatever the reasons, scholarly opinion on Lincoln's exercise of power during the Civil War assumed points of view that have persisted to the present.

Three basic positions may be distinguished in the literature. The first, represented in the work of Dunning, adopted a critical if not openly hostile attitude toward the idea of presidential dictatorship. A second point of view, seen in the account of James Ford Rhodes, expressed critical approval of Lincoln's purportedly dictatorial actions. A third position viewed Lincoln's wartime dictatorship with unqualified approval, and was illustrated in the robust writing of John W. Burgess.

Whereas Dunning drew basically negative conclusions about constitutional dictatorship, James Ford Rhodes described Lincoln's exercise of war powers with qualified approval. In the

third volume of his history, Rhodes said executive measures taken at the start of the war were "the acts of a Tudor rather than those of a constitutional ruler." Yet while attributing despotic powers to Lincoln, he observed that "never had the power of dictator fallen into safer and nobler hands."[4] In his fourth volume Rhodes was more critical. Quoting at length from two of Lincoln's keenest critics, former Supreme Court Justice Benjamin R. Curtis and conservative legalist Joel Parker, he expressed disapproval of the arbitrary arrests and interference with freedom of the press for which Lincoln was responsible. The respect for the Constitution commonly ascribed to Lincoln, Rhodes suggested, had prevented the post-Civil War generation from appreciating "the enormity of the acts done under his authority." The historian also faulted Lincoln's defense of the government's policy in the famous Vallandigham affair as the argument of a clever attorney and politician, not that of a statesman. Nevertheless, Rhodes concluded on a favorable note, declaring that Lincoln was "no Caesar or Napoleon . . . sought no self-aggrandizement, . . . [and] had in his own loyal and unselfish nature a check to the excessive use of absolute power. . . ."[5]

Arch-nationalist John W. Burgess, not only acknowledging presidential dictatorship during the Civil War but also praising it as both wise and constitutional, represented a third point of view on the dictatorship question. Burgess agreed that certain of Lincoln's actions, such as his directing an increase in the size of the army and navy, contradicted express constitutional provisions. Yet may not the president, he asked, "in accordance with the spirit of the Constitution, in time of invasion or rebellion . . . ask his fellow-countrymen to come to the armed support of the Government and the country"? Burgess regarded congressional approval of Lincoln's actions in 1861 as placing the President "practically in the position of a military dictator." And in his opinion this was "good political science and good public pol-




Lincoln presided over the burial of the Constitution in this Democratic cartoon published in 1864.

icy." A constitution that did not permit the exercise of extraordinary dictatorial power, he reasoned, invited violation in times of national crisis.[6] Burgess conceded, however, that the question of the president's temporary dictatorial powers was an unresolved constitutional problem.[7]

World War I stimulated further consideration of the dictatorship problem and reinforced the tendency to examine Lincoln in this light.[8] For some historians, critical realism demanded acknowledgment of Lincoln's successful exercise of dictatorial powers, tempered by doubts about the wisdom of such a course if attempted by less gifted leaders. Nathaniel W. Stephenson, for example, examining the contradiction during the Civil War between the exercise of war powers and individual liberty, attributed to Lincoln the belief that in time of emergency the only recourse was to follow the Roman precedent and permit the use of extraordinary power. Lincoln's view, he concluded, was that democracy must learn to use the dictator as a necessary war tool. Yet it remained to be seen, Stephenson wrote in 1918, whether Lincoln's approach ought to become the model for democratic governments to follow.[9] In his *Constitutional Problems under Lincoln* (1926), James G. Randall similarly recounted emergency executive actions during the war that went far beyond the normal sphere of presidential power. In Randall's view, Lincoln acted with notable restraint and leniency, and a high regard for individual liberty. Reflecting the growing acceptance of the despotism theme, he wrote apologetically: "If Lincoln was a dictator, it must be admitted that he was a benevolent dictator." Yet it was questionable, Randall concluded, whether in a democracy even a benevolent dictator ought to be encouraged.[10]

Randall explored the dictatorship problem more fully in a subsequent essay. Although accepting the analytical usefulness of the concept, he was concerned to draw distinctions between Lincoln's exercise of power and dictatorship as a phenomenon

of twentieth century politics. Randall conceded that in seeking legislative approval for emergency measures at the start of the war, Lincoln acted in the manner of a dictator, and departed significantly from previous constitutional practice in the United States. Lincoln's exercise of power was tempered by humane liberal instincts, however, so that compared to contemporary examples his governing methods fell far short of genuine dictatorship. The principal difference between Lincoln and modern dictators, Randall pointed out, was that Lincoln used his extraordinary powers to save democracy, not to subvert it. Randall's judicious assessment, critical from the standpoint of traditional limited government yet ultimately approving of Lincoln, was echoed in other works of the 1930s and 1940s.[11]

In 1948 Clinton Rossiter, a political scientist, gave powerful reinforcement to the dictatorship theme in a comparative study of crisis government in England, France, Germany and the United States. Reflecting the faith in executive power shared by many political scientists in the New Deal era, he argued that temporary conferral of absolute power on a single ruler was an essential feature of constitutional government. Rossiter recognized that federalism, the separation of powers, and civil liberties guarantees were major obstacles to the creation of constitutional dictatorship in the United States. The existence of a strong executive made it possible, however, and Lincoln's actions during the Civil War first demonstrated this truth. Acting "on no precedent and under no restraint," Lincoln, in Rossiter's view, "was the government of the United States" from the attack on Sumter until the convening of Congress three months later. Thereafter the president shared power with the legislature on many issues, but acted unilaterally as necessity demanded. "Lincoln's actions," Rossiter concluded, "form history's most illustrious precedent for constitutional dictatorship." Although admitting that this precedent could be used for bad as well as

good purposes, Rossiter's endorsement of constitutional dictatorship was as enthusiastic and unapologetic as Burgess's fifty years earlier.[12]

Outside the "lost cause" tradition carried on by unrepentant Confederate sympathizers, few if any writers of serious history in the period 1900 to 1950 applied the dictatorship idea to Lincoln in an outright condemnatory manner.[13] But this changed in the 1960s as the liberal consensus in American historical writing collapsed, and presidential government—now called the "imperial presidency"—came under attack in the aftermath of the Vietnam War. A harbinger of the overtly anti-Lincoln point of view was Edmund Wilson's essay on the Civil War president in *Patriotic Gore* (1962). Wilson argued that in the Lyceum address of 1838, Lincoln identified with the tyrant against whom his appeal for law and order was ostensibly directed. "In the poem that Lincoln lived," Wilson wrote, "it was morally and dramatically inevitable that this prophet who had crushed opposition and sent thousands of men to their deaths should finally attest his good faith by laying down his own life with theirs."[14]

In subsequent years several scholars followed the direction pointed by Wilson. Reviving the point of view most clearly expressed earlier by Dunning, political scientist Gottfried Dietze termed Lincoln's constitutional dictatorship a "constitutional tragedy." Though crediting Lincoln with benign motives, Dietze said his wartime actions were nonetheless revolutionary. Lincoln prepared the way for an "omnipotent national executive" who felt entitled to do whatever he considered in the national interest, irrespective of the rights and interests of the states, the coordinate branches of the government, and individual citizens.[15] Willmoore Kendall, viewing Lincoln as the precursor of liberal activist presidents in the twentieth century, went beyond the dictatorship charge and accused him of derailing the American political tradition. According to Kendall, Lincoln placed

the United States on the road to centralized egalitarianism by making equality an all-consuming national purpose, in derogation of the tradition of community self-government under majority rule and legislative supremacy.[16] In an essay comparing Lincoln and Chief Justice Roger B. Taney, Robert M. Spector asserted that Lincoln's example of unilateral executive action formed a dangerous precedent because it could allow a demagogic leader to determine the meaning of the Constitution. Insisting on the law of necessity in contrast to Taney's attempt to maintain the rule of law, Lincoln in Spector's judgment left a destructive constitutional legacy.[17]

More recently M. E. Bradford, writing with a passion worthy of preeminent Lincoln hater Lyon Gardiner Tyler, has condemned Lincoln's wartime dictatorship. Bradford sees Lincoln's actions as the start of the imperial presidency and the point in our history where republican government began to degenerate into egalitarian democracy.[18] In a breath-taking psychohistorical interpretation that demonstrates the convergence of ideological extremes, radical political scientist Dwight G. Anderson contends that Lincoln "arrogated to himself virtually dictatorial power" and transformed the presidency into an elective kingship. Driven by his desire for fame and distinction, Lincoln is described as having repudiated the constitutional order of the framers and founded a new Union which he made the basis of a political religion. Anderson concludes that Lincoln thus provided a revolutionary model of executive leadership that has driven twentieth century presidents to project the United States into a world imperialist role.[19]

In 1979 Don E. Fehrenbacher stated that more historians have described Lincoln as a dictator or constitutional dictator than any other president.[20] Fehrenbacher did not do so himself, however, thereby implicitly aligning himself with those historians who have rejected the dictatorship theme in relation to

Lincoln.[21] Lord Charnwood, for example, with notable simplicity, stated in his biography that Lincoln was neither a dictator nor an English prime minister, but an elected officer whose powers and duties were prescribed by a fixed constitution.[22] Andrew C. McLaughlin, in a memorable essay of 1936, viewed Lincoln as "an archconstitutionalist" whose "dominating impulse was to protect the very nature of the republic."[23] More recently the English scholar K. C. Wheare and the American constitutional historian Harold M. Hyman have criticized the interpretation of Lincoln as a dictator.[24] Nevertheless, the convention persists. Thus Arthur M. Schlesinger, Jr., in his account of the imperial presidency, states that "Lincoln successfully demonstrated that, under indisputable crisis, temporary despotism was compatible with abiding democracy," while political scientist Richard M. Pious in a new study of the presidency describes Lincoln's exercise of power as a constitutional dictatorship.[25]

## II

In assessing the validity of the dictator theme in the study of Lincoln's presidency the historian may properly turn to the political scientist for analytical assistance. The essence of dictatorship is unlimited absolute power or domination of the state by an individual or a small group. According to the classic work of Alfred Cobban, the political power of the dictator must emanate from his will, it must be exercised frequently in an arbitrary manner, it must not be limited in duration to a specific term of office, and the dictator must not be responsible to any other authority.[26] Arbitrary and unpredictable in its effects, dictatorial power has the connotation of transgressing legal limitations and the boundaries of political legitimacy. The concept of constitutional dictatorship is apparently intended to remove the stigma

of illegality or nonlegitimacy, and refers to the temporary investing of absolute power in a single ruler.[27]

Notwithstanding the pedigree of this notion, there is merit in the suggestion that the existence of institutions of accountability and responsibility marks the critical and essential difference between dictatorship and constitutional government. Where such institutions exist, the idea of constitutional dictatorship becomes meaningless.[28] Those who have subscribed to the dictatorship thesis in analyzing Lincoln have generally acknowledged that emergency government in the United States bears little resemblance to the methods of crisis government in other countries. Rossiter, the most systematic exponent of the dictatorship idea, even admits that as applied to the United States the term is an hyperbole.[29] How, then, account for the persistence of the convention? For those who are hostile to Lincoln it is of course an effective term of opprobrium. Among those whose historical judgment of Lincoln is favorable, reliance on the dictatorship theme is more puzzling. Perhaps it has dramatic and heuristic appeal as a way of understanding and dealing with situations which require the application of force, without abandoning the idea of limitations on power. It may be that the persistence of the dictatorship convention owes something to the ancient longing for a philosopher-king, especially among intellectuals. More certain it is that the convention reflects the strand of western political thought that emphasizes the necessity of a positive exercise of government power, and specifically in the American context the penchant of twentieth-century liberalism for centralized executive and bureaucratic power.

Whatever reasons may have made the dictatorship idea analytically appealing in the past, it is my contention that its use distorts our constitutional history in general, and that it is especially misleading and inaccurate as a description of Lincoln's

presidency. Where real and distinct limitations on the exercise of governmental power exist, in the form of counterbalancing authority and institutions of accountability, there dictatorship —be it called constitutional or otherwise—does not exist.[30] The dictatorship theme is particularly inapposite, moreover, with reference to Lincoln's exercise of power during the Civil War, which was constantly subjected to the restraints of congressional initiative and reaction, political party competition, and the correcting pressures of public opinion. But in rejecting the dictatorship convention we have more to rely on than the fact that politics—and the freedom that it necessarily implies—continued during the war. We are afforded unique insight into the problem of wartime government by Lincoln's own analysis of the dictatorship question, and by the constitutional justification that sustained his exercise of power between Sumter and Appomattox.

III

A critic of the Democratic doctrine of broad executive power early in his political career, Lincoln throughout his presidency was conscious of and respected the legal limits which circumscribed the office of chief magistrate. In part seeking to allay southern apprehension, in part expressing his considered constitutional judgment, he saw fit, upon taking office in 1861, to comment on the generally restricted scope of the federal government's field of action. The Constitution, he said in his first inaugural address, gave government officials "but little power for mischief." No single administration, he asserted, as long as the people to whom it was accountable remained virtuous and vigilant, could seriously injure the government within a four-year term. As chief executive, Lincoln conceived it his duty to administer the government as it came to him and transmit it to his successor unimpaired. Addressing the issue of secession, he

emphasized in his inaugural address that he had no discretionary authority to fix terms for the separation of the states, a thing that only the people could do if they so desired.[31]

Lincoln's respect for the legal limits on executive power was evident in his dealing both with pedestrian administrative questions and larger matters of state. In March 1861, for example, he drafted an order establishing a central bureau to supervise the organization, drill, and equipment of the militia. Inquiring as to his legal authority to do so, he was informed by the Attorney General that none existed, and the order was not given.[32] On numerous other issues Lincoln routinely sought opinions concerning his legal authority to perform executive acts.[33] And consistent with the narrow view of executive power which he had expressed in the 1840s, he denied that he could veto legislation merely on the basis of subjective disagreement with the policy contained in legislation.[34]

From time to time Lincoln specifically commented on the dictatorship question, which was a controversial subject throughout the war. He did so for the first time in the Browning letter of September 22, 1861, dealing with his revocation of the emancipation order issued by General John C. Frémont in Missouri. Writing to Republican Senator Orville H. Browning of Illinois, Lincoln expressed the opinion that slaves, like other property, could be seized and temporarily used for military purposes. But their permanent status could not be determined by a military decree, such as Frémont's, that was based on "purely political" reasons "not within the range of *military* law, or necessity." To do that, said Lincoln, would be "simply 'dictatorship,'" for it would assume that a military commander "may do *anything* he pleases," such as, in the present instance, confiscating the lands and freeing the slaves of loyal as well as disloyal people. Lincoln believed that Congress might by legislation permanently fix the status of slaves employed for military purposes. "What I object

to," he explained, "is that I as President, shall expressly or impliedly seize and exercise the permanent legislative functions of the government."[35]

The usual view of Lincoln's presidency is that he abandoned this narrow conception of executive power in favor of a more plenary one which allowed him to do what he had prohibited Frémont from doing.[36] In May 1862, for example, he revoked another emancipation order, issued by General David Hunter in South Carolina. In doing so he announced: ". . . whether it be competent for me, as Commander-in-Chief of the Army and Navy, to declare the Slaves of any state or states, free, and whether at any time, in any case, it shall have become a necessity indispensable to the maintenance of the government, to exercise such supposed power, are questions which, under my responsibility, I reserve to myself. . . ."[37] Of apparently similar import is Lincoln's statement of September 1862, that he had no objection to a proclamation of emancipation, since his power as commander-in-chief gave him "a right to take any measure which may best subdue the enemy."[38] It was of course on this military basis that the Emancipation Proclamation rested—a basis succinctly described by Lincoln in the Conkling letter of August 1863 when he wrote: "I think the constitution invests its commander-in-chief, with the law of war, in time of war."[39]

This apparent progression toward a concept of plenary executive power is cited in support of the constitutional dictatorship thesis.[40] Yet the position attributed to Lincoln in 1862–63 does not necessarily contradict the position he assumed in 1861, as expressed in the Browning letter. At that time Lincoln said that military power could not be used for purely *political* reasons to emancipate slaves and determine their future status. He did not, in the Browning letter, disclaim power as commander-in-chief to free and fix the status of slaves for *military* reasons essential to the preservation of the government. In 1863 he deemed it neces-

sary to exercise such power, which may properly be regarded as having been reserved in the revocation of the Frémont order.

In explaining his view of dictatorship, Lincoln in the Browning letter also disavowed the ability of the executive to exercise "the permanent legislative function of the government," as in determining the permanent status of slaves used for military purposes. This position, too, he maintained later in the war.

Here it is important to note the controversy in 1863 over the validity and legal effect of the Emancipation Proclamation. Democrats called the proclamation an unconstitutional and illegal nullity; conservative Unionists thought it was temporarily effective where military authority might make it so; and the main body of Republicans said it conferred a right of personal liberty.[41] Lincoln believed the Emancipation Proclamation constitutional, though acknowledging it might be found to be otherwise, and pledged to maintain the freedom of emancipated slaves.[42] Yet he claimed no authority to fix the legal status of freed slaves, nor to abolish slavery in state laws and constitutions. It soon became clear that a constitutional amendment prohibiting slavery and permanently guaranteeing the freedom of the emancipated blacks was necessary. Lincoln of course lent his political support to this undertaking, but in a constitutional sense the framing and adoption of the Thirteenth Amendment were none of his affair as chief executive.[43] This ultimate exercise of the legislative power, as Lincoln noted in the Browning letter of 1861, belonged to the people and their elected representatives in the law making branch.

Lincoln remained conscious of the restriction on military power which he considered the essential safeguard against dictatorship. Urged by Secretary of the Treasury Salmon P. Chase in 1863 to extend the Emancipation Proclamation to parts of Virginia and Louisiana that had been exempted, he refused on the ground that the order "has no constitutional or legal justification, except

as a military measure." To apply it in the absence of military necessity, he told Chase, "without any argument, except the one that I think the measure politically expedient, and morally right," would be to give up "all footing upon the constitution or law. . . ." In the language used in his 1861 comment upon dictatorship, it would be acting for "purely political" reasons. Lincoln asked: "Would I not thus be in the boundless field of absolutism?" And would not such a course provoke fears that "without any further stretch, I might do the same in Delaware, Maryland, Kentucky, Tennessee, and Missouri; and even change any law in any state?"[44]

It is possible of course to dismiss these professions of concern for constitutional limitations and determination to avoid dictatorial solutions as mere rhetoric. It is virtually impossible, however, to deny the most impressive evidence weighing against the dictatorship thesis—the continuation of party competition in the election of 1864.

As Mark E. Neely, Jr. has recently observed, historians have generally failed to appreciate the critical nature of this election, in which the Democrats demanded the cessation of hostilities and refrained from opposition to slavery. Although one cannot know what would have happened had McClellan won, the possibility of a negotiated settlement recognizing the Confederacy and the greater likelihood of the continuation of slavery ought to be acknowledged.[45] Historians have also, it should be noted, failed to appreciate the significance for American constitutionalism in the very fact that the election was held. In part this failure stems from the tendency common in stable democratic societies to take for granted institutions and procedures that most other countries must still struggle to achieve. It also reflects the peculiar American attitude toward politics, which at times seems to regard elections as more to be regretted and endured than applauded as a vital part of constitutional government. In

any case, in facing the Democratic challenge in 1864, Lincoln accepted a risk and permitted his power to be threatened in a way that no dictator, constitutional or not, would have tolerated.

Lincoln was aware of the critical nature of the election and of its importance for republican constitutionalism. Although Democratic victory might lead to disunion and the preservation of slavery, he never wavered in his willingness to accept the possibility of a change in administration. In August 1864 he recorded privately his determination, should he lose the election, to cooperate with the Democratic president-elect in a final effort to save the Union.[46] When the election was over, Lincoln told his cabinet of this resolve, explaining that both duty and conscience required it.[47] As Charles A. Beard wrote, "This is not the language of a despot, a Caesar or a wrecker. It is the language of a man remarkably loyal to constitutional methods, ready to abide by the decision of the people lawfully made. . . ."[48]

During the campaign there were rumors that, if defeated, Lincoln would try to "ruin the government," as a dictator might contemplate doing.[49] In October 1864 Lincoln addressed these rumors. Stating that he was trying to save the government, not destroy it, he publicly pledged that he would serve as President until March 4, 1865, and that whoever was constitutionally elected would at that time be installed as chief magistrate. Lincoln also intended this statement to allay apprehension that if the Democratic party won, it would try to seize the government.[50]

After the election, Lincoln summed up its significance before a public gathering at the White House. If the rebellion tested the people when they were united, he suggested, "must they not fail when *divided*, and partially paralized by a political war among themselves?" But the election was a necessity. "We can not have free government without elections;" he declared, "and if the rebellion could force us to forego, or postpone a national election, it might fairly claim to have already conquered and

ruined us." Returning to the question that he had posed at the start of the war, namely, whether a democratic government could defend itself, he said the election demonstrated "that a people's government can sustain a national election, in the midst of a great civil war."[51]

Lincoln's well reasoned and persuasive analysis of the dictatorship question ought not to strike us as remarkable. What is remarkable, in view of the evidence that so plainly refutes it, is the persistence of the dictatorship convention. Surely there is a more accurate way to describe the exercise of presidential power during the Civil War and its constitutional justification than by invoking this dubious notion. Nor will the concept of a "constitutional" dictatorship, as I have suggested, answer our needs. In either version the dictatorship argument is flawed because it requires the conclusion that the existing Constitution was inadequate.

An alternative interpretation of Civil War government, noting its substantial continuity with prewar practices, would hold that the Constitution, limitations and all, was adequate to the needs of the Union in this its severest crisis. The nation's organic law was not set aside for an unlimited, dictatorial concentration of power. On the contrary, the Constitution continued to serve both as symbol and source of governmental legitimacy and as a normative standard for the conduct of politics. To assist in understanding this alternative constitutional outlook we can consult no more perceptive or authoritative explanation than the rationale that Lincoln himself offered for wartime executive action.

## IV

Lincoln employed a two-track constitutional justification in explaining the legitimacy of controversial measures adopted under executive authority. The first and more familiar track involved

legalistic arguments from the text of the Constitution. The second involved more broadly political arguments concerning the relationship between the Union, the Constitution, and the nature of republican government.[52]

An able lawyer familiar with constitutional analysis, Lincoln frequently advanced legalistic arguments in which the Constitution was conceived of as a form of positive law.[53] Perhaps his best known argument in this mode concerned executive suspension of the privilege of the writ of habeas corpus. In his July 4, 1861 message to Congress, he cited Article I, Section 9 of the Constitution, which confers power to suspend the writ of habeas corpus in cases of rebellion or invasion when the public safety requires it. Since the Constitution does not specify who may exercise this power, Lincoln reasoned that the President could do so, in time of emergency when Congress was not in session.[54]

Lincoln offered additional constitutional justification of habeas corpus suspension in the Corning letter of June 1863. Democratic critics contended that the government could make no arbitrary arrests nor suspend the habeas corpus privilege outside the area of rebellion and lines of military occupation. Lincoln argued in contrast that since the Constitution "makes no such distinction, I am unable to believe that there is any such constitutional distinction." The writ could be suspended and arrests made *whenever* the public safety required it, he insisted, and *wherever* this might occur.[55] Lincoln was similarly legalistic in responding to a Democratic argument that rested on the hypothetical assumption that the Constitution be read without the habeas corpus suspension clause. To this Lincoln countered: "Doubless [*sic*] if this clause of the constitution, . . . were expunged, the other guarranties would remain the same; but the question is, not how those guarranties would stand, with that clause *out* of the constitution, but how they stand with that clause remaining in it. . . ."[56]

Couched in the usual idiom of constitutional politics, Lincoln's arguments were appropriate expressions of the legalistic side of American constitutionalism.[57] Yet, ironically, it is possible to interpret some of Lincoln's statements in this idiom in a way that supports the dictatorship thesis. In his message to the special session of Congress in 1861, referring to habeas corpus suspension, Lincoln asked: ". . . are all the laws *but one*, to go unexecuted, and the government itself to go to pieces, lest that one be violated?"[58] In a message to Congress of May 1862, he described some of the measures taken at the start of the war as "without any authority of law. . . ."[59] And in a statement of 1864 he seemed to imply that the Constitution might be broken to save the Union. "By general law life *and* limb must be protected;" he observed, "yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb."[60] In this metaphor the nation is the life to be saved, the Constitution the limb that might need amputation. The inference can be drawn that emergency action to save the government is expedient, yet also unconstitutional and lawless.

Lincoln of course denied that emergency measures to save the government were unlawful, adducing the legalistic arguments noted above. In addition, and more persuasively, he offered a political-philosophical defense of executive actions that dwelt on the relationship between the Union and the Constitution.

The perspective from which Lincoln offered this more systemic constitutional justification appears in the fragment on the Constitution and the Union presumably written in January 1861. Reiterating the theme that absorbed him as the struggle over slavery reached its climax, Lincoln stated that beyond the Constitution and the Union lay the principle of liberty expressed in the Declaration of Independence. The assertion of this principle, he wrote, "was the word, 'fitly spoken' which has proved an 'apple of gold' to us." "The *Union*, and the *Constitution*," he

continued, "are the *picture* of *silver*, subsequently framed around it." Observing that the picture was made for the apple and not the other way around, he urged actions to ensure "that neither *picture*, or *apple* shall ever be blurred, or bruised or broken."[61]

In this passage Lincoln was primarily concerned to define republican liberty as the fundamental purpose of national existence. For our purposes what is of interest is the equivalence or identity assumed to exist between the nation (the Union) and the Constitution. Destroy liberty—or allow this sacred principle to be eroded by the spread of slavery—and both the nation and the Constitution would be lost.

Justifying emergency actions taken at the start of the war, Lincoln in his message to Congress of July 4, 1861 reaffirmed liberty as the purpose of national existence. The war, he declared, was "a People's contest . . . a struggle for maintaining in the world, that form, and substance of government, whose leading object is, to elevate the condition of men. . . ."[62] But an equally important issue was also involved: "whether a constitutional republic, or a democracy . . . can, or cannot, maintain its territorial integrity, against its own domestic foes." "'Is there, in all republics,'" Lincoln asked, "'this inherent, and fatal weakness?' 'Must a government, of necessity, be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence?'" Seeking to avoid both extremes, Lincoln announced: ". . . no choice was left but to call out the war power of the Government; and so to resist force, employed for its own destruction, by force, for its preservation."[63]

Was it, then, lawful and constitutional to defend the Union and the Constitution? And was it possible to do so without resort to dictatorial power? Plainly Lincoln believed it was, and this not mainly in consequence of any construction of positive law or constitutional text, but rather on the self-evident truth that the Constitution justifies extraordinary action to preserve the sub-

stance of political liberty that constitutes both its own end and the purpose of the nation. In the Hodges letter of April 1864, Lincoln expressly equated Union and Constitution in justifying executive actions. He wrote: "I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation."[64] To preserve the nation, in other words, was to preserve the Constitution. "I could not feel that, to the best of my ability, I had even tried to preserve the constitution," he added, "if, to save slavery, or any minor matter, I should permit the wreck of government, country, and Constitution all together."[65]

In this sentence Lincoln twice uses the word "constitution", spelling it with a lower-case and then an upper-case "C". Does this mean he has in mind two different conceptions of the term? One may perhaps draw that inference, considering the two-track constitutional justification he employed to explain the lawfulness of emergency war measures. The Constitution was not only the written instrument of government adopted at the nation's founding and intended to function as a supreme legal code. It was also the principles, ideals, institutions, laws and procedures tending toward the maintenance of republican liberty by which the American people agreed to order their political existence. The Constitution, in other words, was not merely positive law, derivative or reflective of national life, as in the life-and-limb metaphor noted above that is typically used to illustrate Lincoln's approach to constitutional justification. Rather, the Constitution *was* the nation, or—to put it the other way around in a way that is perhaps more meaningful and revealing —the nation *was* the Constitution: America was the system of political liberty created by the founders and now defended against an internal enemy.[66] In the Hodges letter Lincoln asked whether it was "possible to lose the nation, and yet preserve the

constitution."[67] If the Constitution was simply a legal code, the possibility existed. But under Lincoln's political-philosophical view of the Constitution it was not possible to lose the nation while preserving the Constitution. To lose one was to lose the other.

This nonlegalistic, nonjuridical conception of the Constitution was not nearly so uncommon in the nineteenth century as it has become today. Indeed, it was vigorously expressed in an influential treatise by Lincoln's legal advisor in the War Department, William Whiting, in his widely circulated *War Powers Under the Constitution of the United States*. Strict constructionists, Whiting noted, insisted on the letter of the Constitution and were unable to see that the Constitution was "only a frame of government, a plan in outline for regulating" national life. Strict constructionists saw the Constitution as "incapable of adaptation to our changing conditions, as if it were . . . an iron chain, girdling a living tree, which could have no further growth unless by bursting its rigid ligature." Whiting rejected this narrow legalism. The Constitution, he wrote, "more resembles the tree itself, native to the soil that bore it, waxing strong in sunshine and in storm, putting forth branches, leaves, and roots, according to the laws of its own growth. . . ." Foregoing metaphor, Whiting then offered an historical analogy: "Our Constitution, like that of England, contains all that is required to adapt itself to the present and future changes and wants of a free and advancing people."[68] To be sure, these are Whiting's words, not Lincoln's. Yet they seem aptly to express the tendency of Lincoln's constitutionalism.

It is of course the nature of Lincoln's constitutionalism that is placed in dispute by the dictatorship convention. Advocates of that interpretation ultimately see Lincoln as disregarding or transcending constitutional limitations. Their position is implicitly reinforced by those who describe Lincoln as a pragmatic


British cartoonist Matt Morgan showed Lincoln present as the American Constitution was burned at the stake in this 1863 cartoon.

instrumentalist who subscribed to the theory of the "living Constitution" and regarded it as a social document capable of organic growth.[69] This is perhaps a plausible conclusion which the quotation from Whiting, and Lincoln's own equating of the Constitution and the nation, might appear to support. The trouble with the pragmatic-instrumentalist approach to the Constitution, however, is that it tends to negate the idea of constitutional limitations. It encourages an "anything goes" mentality that justifies purposes and objects remote from those envisioned by the framers of the Constitution, and presumably excluded by them except through the process of constitutional amendment. It rejects original intention as a guide to constitutional interpretation. And, I believe, it gravely misunderstands Lincoln and the Civil War generation, who were closer in outlook to the fixed constitutionalism of the founding fathers than to the pragmatic liberalism of the twentieth century.

We may take Chief Justice John Marshall as illustrative of the constitutional outlook of the founding generation and the early national period, which informed Lincoln's statesmanship. In his most famous admonition, in *McCulloch v. Maryland*, Marshall declared: "We must never forget that it is a *constitution* we are expounding . . . intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."[70] Marshall did not mean that the Constitution was infinitely flexible or that new powers and purposes of government could be fashioned out of whole cloth, as advocates of the "living constitution" seem to assume. He meant that the purposes and objects set forth by the framers in the fundamental law must always be the touchstone and test of constitutional legitimacy, the criterion to be employed in constitutional adaptation and adjudication. May we not consider defense of the Union and the Constitution a legitimate object assigned to the federal government by the framers? And may we not conclude that Lincoln's exercise of

power to this end was compatible with the concept of a fixed Constitution?

Ultimately Lincoln appealed to a kind of constitutional common sense that while respecting the requirements of procedural regularity and formal legality, was concerned above all with preserving the substance of republican liberty—the purpose both of American nationality and the constitutional order. One sees this in Lincoln's opinion on the admission of West Virginia to the Union in December 1862.

In accordance with constitutional requirement, the Unionist movement in Virginia, sustained by the Lincoln administration and recognized as the loyal government of the state, had given its approval to the creation of West Virginia. Opponents of partition condemned it as unconstitutional on the ground that the loyal Pierpont government was not the legitimate government of the state, because chosen at an election in which the majority of Virginia voters (living in rebellious areas) had not participated. Lincoln rejected this argument. "Can this government stand," he asked, "if it indulges constitutional constructions by which men in open rebellion against it, are to be counted . . . the equals of those who maintain their loyalty to it?" Only by entertaining "these absurd conclusions," he reasoned, could it be denied that the body that consented to the creation of West Virginia was the legislature of Virginia. Lincoln continued: "It is said, the devil takes care of his own. Much more should a good spirit—the spirit of the Constitution and the Union—take care of it's own. I think it can not do less, and live."[71] This was not the urging of a dictator, whether benevolent or otherwise, but of a constitutionalist faithful to the purpose for which the Union and the Constitution were created and ordained.

## NOTES

1. Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton, 1948), 238.

2. Michael Davis, *The Image of Lincoln in the South* (Knoxville, 1971), 80, 130–133.

3. William Archibald Dunning, *Essays on the Civil War and Reconstruction* (New York, 1904), 20–21, 56–59.

4. James Ford Rhodes, *History of the United States from the Compromise of 1850 to the Final Restoration of Home Rule at the South in 1877* (7 vols., New York, 1893–1900), III, 441–442.

5. *Ibid.*, IV, 169, 171, 234–235, 250.

6. The same point was made by Sydney George Fisher in "The Suspension of Habeas Corpus During the War of the Rebellion," *Political Science Quarterly*, Vol. 3 (September 1888), 454–485. Fisher, thoroughly approving of Lincoln's actions, did not describe them as in any way dictatorial.

7. John W. Burgess, *The Civil War and the Constitution* (2 vols., New York, 1901), I, 228, 232, 236.

8. See Lindsay Rogers, "Presidential Dictatorship in the United States," *Quarterly Review*, Vol. 131 (1919); Henry Jones Ford, "The Growth of Dictatorship," *Atlantic Monthly*, Vol. 121 (1918), 632–640; Charles Warren, "Lincoln's 'Despotism' as Critics Saw It in 1861," New York *Times*, May 12, 1918, section 5, p. 2. In 1923 John W. Burgess wrote a bitter lamentation condemning the growth of democratic Caesarism and the demise of limited government. Not surprisingly considering his Unionist background, yet perhaps significantly, he attributed none of this development to Lincoln, but rather saw Theodore Roosevelt as its source. See Burgess, *Recent Changes in American Constitutional Theory* (New York, 1923).

9. Nathaniel W. Stephenson, *Abraham Lincoln and the Union* (New Haven, 1918), 160–161. Reflecting the anti-Radical outlook of most historians at this time, Stephenson believed that the Radical Republicans in Congress presented a far more serious threat of dictatorship than Lincoln. See his *Lincoln* (New York, 1922).

10. James G. Randall, *Constitutional Problems Under Lincoln*, rev. ed. (Urbana, 1951; orig. publ. 1926), 30–47.

11. James G. Randall, "Lincoln in the Role of Dictator," *South Atlantic Quarterly*, Vol. 28 (July 1929), 236–252. *Cf.* Carl Russell Fish, ed. William E. Smith, *The American Civil War* (New York, 1937), 464; Homer C. Hockett, *The Constitutional History of the United States 1826–1876* (New York, 1939), 273–275, 287; George Fort Milton, *The Use of Presidential Power 1789–1943* (New York, 1944), 109–111.

12. Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton, 1948), 212, 224. See also Rossiter, "Constitutional Dictatorship in the Atomic Age," *Review of Politics*, Vol. 11 (October 1949), 395–418.

13. On the neo-Confederate view of Lincoln, see Don E. Fehrenbacher, "The Anti-Lincoln Tradition," *Papers of the Abraham Lincoln Association*, Vol. IV (1982), 17–22. Edgar Lee Masters attacked Lincoln as a tyrant in *Lincoln the Man* (New York, 1931), but while his work was not in the neo-Confederate tradition, neither ought it to be regarded as a serious scholarly contribution.

14. Edmund Wilson, *Patriotic Gore: Studies in the Literature of the American Civil War* (New York, 1962), 130. Wilson's essay was first published in 1953.

15. Gottfried Dietze, *America's Political Dilemma: From Limited to Unlimited Democracy* (Baltimore, 1968), 17–62.

16. Willmoore Kendall and George W. Carey, *The Basic Symbols of the American Political Tradition* (Baton Rouge, 1970), 85–94.

17. Robert E. Spector, "Lincoln and Taney: A Study in Constitutional Polarization," *American Journal of Legal History*, Vol. 15 (July 1971), 199–214.

18. M. E. Bradford, "The Lincoln Legacy: A Long View," *Modern Age*, Vol. 24 (Fall, 1980), 355–363. A little-noticed irony occurred in 1981 when Bradford, author of notorious anti-Lincoln diatribes, was considered for the position of director of the National Endowment for the Humanities by the newly elected Republican administration of President Ronald Reagan. More than any President in recent memory, Reagan has invoked the principles and rhetoric of Lincoln. Fortunately the appointment was not made, evidence that the southernization of the Republican party has not proceeded so far as to place a passionate critic of Lincoln in a position of scholarly and intellectual leadership.

19. Dwight G. Anderson, *Abraham Lincoln: The Quest for Immortality* (New York, 1982), 8, 10–11, 166, 219. Anderson's critique, written from a leftist point of view, strikingly resembles the Kendall-Bradford conservative attack. What both points of view have in common of course is hostility toward bourgeois capitalism and liberal democracy, with which Lincoln identified himself.

20. Don E. Fehrenbacher, "Lincoln and the Constitution," in Cullom Davis, ed., *The Public and the Private Lincoln: Contemporary Perspectives* (Carbondale, Ill., 1979), 127.

21. In describing the dictatorship convention I do not imply that virtually every book on Lincoln presents him in this light. Most works in the Lincoln field, general biographical accounts and specialized studies, are not concerned with governmental problems and do not take up the dictatorship question. In referring to historians who have rejected the dictatorship thesis, I refer to those few who have expressly considered it and found it unpersuasive.

22. Lord Charnwood, *Abraham Lincoln* (New York, 1917), 266.

23. Andrew C. McLaughlin, "Lincoln, the Constitution, and Democracy," *International Journal of Ethics*, Vol. 47 (October, 1936), 1–24.

24. K. C. Wheare, *Abraham Lincoln and the United States* (London, 1948), 165; Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (New York, 1973), 75. Also to be noted are two accounts of the civil liberties question during the Civil War which refute the dictatorship argument: A. C. Cole, "Lincoln and the American Tradition of Civil Liberty," *Illinois State Historical Society Journal*, Vol. 19 (October 1926–January 1927), 102–114, and Kenneth A. Bernard, "Lincoln and Civil Liberties," *Abraham Lincoln Quarterly*, Vol. 6 (September 1951), 375–399. Richard N. Current, in "The Lincoln Presidents," *Presidential Studies Quarterly*, Vol. 9 (Winter 1979), 32, aptly observes that political scientists and politicians invoking Lincoln's example have exaggerated his usurpations as president. "Neither by word nor by deed," Current concludes, "did Lincoln give any real justification for the idea of 'executive privilege' or of an 'imperial presidency.'"

25. Arthur M. Schlesinger, Jr., *The Imperial Presidency* (New York, 1973), 74; Richard M. Pious, *The American Presidency* (New York, 1979), 57.

26. Otto Stammler, "Dictatorship," *International Encyclopedia of the Social Sciences*, Vol. 4 (New York, 1968), 161–168; Alfred Cobban, *Dictatorship: Its History and Theory* (New York, 1939), 26.

27. Henry R. Spencer, "Dictatorship," *Encyclopedia of the Social Sciences*, Vol. 5 (New York, 1931), 133. The concept of *constitutional* dictatorship appears to have been an attempt to retain the original meaning of dictatorship as the voluntary adoption of one-man rule by a republic or democracy, in the face of the establishment in the twentieth century of permanent dictatorships by totalitarian states. In earlier times the idea of a permanent dictatorship would have been regarded as a contradiction in terms, and would have been described as despotism. Cf. Robert C. Brooks, *Deliver Us From Dictators*! (Philadelphia, 1935), 22.

28. Karl Loewenstein, review of Rossiter, *Constitutional Dictatorship*, *American Political Science Review*, Vol. 42 (October 1949), 1008.

29. Rossiter, *Constitutional Dictatorship*, 209, 286.

30. Henry Jones Ford, a prominent advocate of executive power in the early twentieth century, provides a good example of the scholarly attraction to the dictatorship idea despite its apparent incompatibility with basic democratic values. Ford emphasized the distinction between responsible and irresponsible government, rather than limitations on executive power, as the essential difference between constitutional government and despotism. Strangely, however, Ford did not regard the enforcing of accountability as a limitation on power. It is difficult to see in Ford's analysis, and in the writings of other proponents of the constitutional dictatorship thesis, the existence in the United States of the absolute and unlimited power which in their view characterizes this institutional condition. *Cf.* Ford, "The Growth of Dictatorship," *Atlantic Monthly*, Vol. 121 (1918), 632–640.

Pertinent in this connection is the assertion of Karl Dietrich Bracher, that crisis government results when "the system of limitation and balance of power typical of a constitutional government" is abandoned in favor of enlarged executive or military power. Bracher does not cite the United States as an example of crisis government in this sense. He states that in the United States constitutional theory agrees on implied or inherent powers for the President as a way of dealing with emergencies. He notes, however, that controls by courts and the legislature are not curtailed in emergencies by the exercise of executive power. Bracher, "Crisis Government," *International Encyclopedia of the Social Sciences*, Vol. 3 (New York, 1968), 514.

31. Roy P. Basler, eds., *The Collected Works of Abraham Lincoln* (9 vols., New Brunswick, N.J., 1953–1955), IV, 270–271.

32. *Ibid.*, 291.

33. For example, to appoint an officer whose assignment would be temperance work among the troops, or to remit a fine imposed on a restaurateur for selling spirits to a soldier. *Ibid.*, 451, V, 270.

34. *Ibid.*, VII, 414. This veto concerned a bill reducing the fees paid to the marshal of the District of Columbia.

35. *Ibid.*, IV, 531–532.

36. Edward S. Corwin, *The President: Office and Powers*, 4th rev. ed. (New York, 1957), 450–451.

37. *Collected Works*, V, 222.

38. *Ibid.*, V, 421. This statement was made in reply to a memorial supporting emancipation adopted by a public meeting of Christians of all denominations in Chicago in September 1862.

39. *Ibid.*, VI, 408. Lincoln described the Emancipation Proclamation "as a fit and necessary war measure" for suppressing the rebellion, authorized un-

der the power vested in him as commander in chief of the army and navy "in time of actual armed rebellion against authority and government of the United States. . . ." *Ibid.*, VI, 29.

40. Rossiter, *Constitutional Dictatorship*, 233.

41. Herman Belz, *A New Birth of Freedom: The Republican Party and Freedmen's Rights 1861–1866* (Westport, Conn., 1976), 36–40.

42. Lincoln wrote in August 1863: "During my continuance here, the government will return no person to slavery who is free according to the proclamation or to any of the acts of congress, unless such return shall be held to be a legal duty, by the proper court of final resort, in which case I will promptly act as may then appear to be my personal duty." *Collected Works*, VI, 411. See also *ibid.*, 408.

43. For obvious political reasons, Lincoln signed the resolution submitting the Thirteenth Amendment to the states. This action, however, was constitutionally anomalous, as the Senate pointed out in a resolution of February 7, 1865, stating that presidential approval of resolutions proposing constitutional amendments was unnecessary. *Ibid.*, VIII, 253–254.

44. *Ibid.*, VI, 428–429. See also Lincoln's letter to Albert G. Hodges, April 4, 1864, in which he stated his belief that the presidency did not confer "an unrestricted right to act officially" upon the basis of his antislavery feelings, or "in ordinary civil administration . . . to practically indulge my primary abstract judgment on the moral question of slavery." *Ibid.*, VII, 281.

45. Mark E. Neely, Jr., "The Lincoln Theme Since Randall's Call: The Promises and Perils of Professionalism," *Abraham Lincoln Association Papers*, Vol. 1 (1979), 18–21.

46. Lincoln wrote this memorandum on August 23, a few days before the Democratic convention. He believed that should the Democratic candidate win, "he will have secured his election on such ground that he cannot possibly save [the Union] afterwards." The final effort to save the Union must therefore come between the election and the inauguration of the next president in March 1865. Lincoln evidently anticipated a "peace plank" such as the Democrats included in their platform. The platform called for "a cessation of hostilities, with a view to an ultimate convention of the States, or other peaceable means, to the end that, at the earliest practical moment, peace may be restored on the basis of the federal Union of the States."

47. *Collected Works*, VII, 514.

48. Charles A. Beard, *The Republic* (New York, 1944), 68.

49. *Collected Works*, VIII, 52. Lincoln acknowledged the rumors in response to a serenade, October 19, 1864.

50. Lincoln noted that the Democratic convention did not adjourn *sine die*, but to meet again if called to do so. This fact, he said, had led to speculation

that, if elected, the Democratic candidate would try to seize the government immediately. *Ibid.*, VIII, 52.

51. *Ibid.*, VIII, 100–101.

52. In positing this concept of constitutional reasoning and justification I follow the views expressed by Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* (Baton Rouge, 1969).

53. Lincoln's effective use of this conceptual outlook can be seen in the first inaugural address, in the contention that no right "plainly written in the Constitution" had ever been denied. In lawyer-like fashion, he cleverly sought to disarm the secessionists by arguing that only if a "plainly written" constitutional right were denied by an electoral majority, would revolutionary action by a minority (in this instance, secession) be morally justified. Happily, he continued, "All the vital rights of minorities, and of individuals, are so plainly assured to them, by affirmations and negations, guarranties and prohibitions, in the Constitution, that controversies never arise concerning them." In fact, he explained, controversies arise over rights and powers that are not "plainly written," such as the fugitive slave law and slavery in the territories. *Collected Works*, IV, 267.

54. *Ibid.*, IV, 430–431.

55. *Ibid.*, VI, 265.

56. *Ibid.*, VI, 302.

57. I refer to the fact that while the American constitution in the broadest sense is the complex of principles, institutions, laws, practices, and traditions by which political life is carried on, its minimal and irreducible basis is a form of positive law—the written documentary Constitution. This circumstance gives American constitutionalism a highly legalistic character.

58. *Collected Works*, IV, 430. See Corwin's interpretation of this statement, *The President: Office and Powers*, 230.

59. *Ibid.*, V, 242.

60. *Ibid.*, VII, 281.

61. *Ibid.*, IV, 168–169.

62. *Ibid.*, IV, 438.

63. *Ibid.*, IV, 426.

64. *Ibid.*, VII, 281.

65. *Ibid.*

66. Compare the recent analysis of Lincoln's constitutional theory by political scientist Gary Jacobsohn: "Lincoln saw the Constitution as both a legal code and a statement of the ideals which we as a people chose 'in the end to live by.'" Gary J. Jacobsohn, "Abraham Lincoln 'On this Question of Judicial Authority': The Theory of Constitutional Aspiration," *Western Political Quarterly*, Vol. 36 (March 1983), 52–70, at 66.

67. *Collected Works*, VII, 281.

68. William Whiting, *War Powers Under the Constitution of the United States*, 43rd ed. (Boston, 1871), 8–9.

69. Cf. Morgan D. Dowd, "Lincoln, the Rule of Law and Crisis Government: A Study of his Constitutional Law Theories," *University of Detroit Law Journal*, Vol. 39 (June 1962), 633–649.

70. 4 *Wheaton* 316 (1819), at 407.

71. *Collected Works*, VI, 27.

## HERMAN BELZ

Herman Belz was born in 1937. He earned his undergraduate degree at Princeton University in 1959 and his Ph.D. at the University of Washington in 1966. Immediately afterward, he began teaching at the University of Maryland, where he is now Professor of History.

Professor Belz's first book, *Reconstructing the Union: Theory and Policy during the Civil War* (Ithaca: Cornell University Press, 1969; reprinted by Greenwood Press in 1979), won the American Historical Association's prestigious Albert J. Beveridge Award. In addition to numerous articles on American constitutional history, Professor Belz subsequently wrote two more books: *A New Birth of Freedom: The Republican Party and Freedmen's Rights, 1861–1866* (Westport, Connecticut: Greenwood Press, 1976) and *Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era* (New York: W. W. Norton, 1978). His status as one of the foremost authorities on the history of the American Constitution is symbolized by his co-authorship of the sixth edition of *The American Constitution: Its Origins and Development* (New York: W. W. Norton, 1983), the standard academic text on the subject.

Professor Belz has earned numerous awards, fellowships, and prizes, including a John Simon Guggenheim Memorial Fellowship (1980–1981).